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5                   UNITED STATES DISTRICT COURT  
6                   WESTERN DISTRICT OF WASHINGTON  
7                   AT TACOMA

8                   THERMAPURE, INC., a California  
9                   corporation,

10                  Plaintiff,

11                  v.

12                  WATER OUT OREGON, INC., an  
13                  Oregon corporation, and WATER OUT  
14                  OF OREGON, INC., an Oregon  
15                  corporation d/b/a Water Out Oregon,

16                  Defendants.

17                  CASE NO. C11-5958 BHS

18                  ORDER GRANTING  
19                  PLAINTIFF'S MOTION TO  
20                  STRIKE AND DENYING  
21                  DEFENDANTS' MOTION FOR  
22                  ATTORNEYS' FEES

23                  This matter comes before the Court on Defendants Water Out Oregon Inc. and  
24 Water Out of Oregon, Inc.'s ("WOO") motion for attorney fees (Dkt. 57) and Plaintiff  
25 ThermaPure, Inc.'s ("ThermaPure") motion to strike (Dkt. 69). The Court has considered  
26 the pleadings filed in support of and in opposition to the motion and the remainder of the  
27 file and hereby grants the motion to strike and denies the motion attorneys' fees for the  
28 reasons stated herein.

1                   **I. PROCEDURAL HISTORY**

2                   On November 18, 2011, ThermaPure filed a complaint alleging (“WOO”)  
3 infringes United States Patent No. 6,327,812 (“the ‘812 patent”). Dkt. 1.

4                   On February 21, 2012, WOO filed a motion for partial summary judgment of non-  
5 infringement. Dkt. 17. On May 7, 2012, ThermaPure responded. Dkt. 27. On May 21,  
6 2012, WOO replied (Dkt. 31) and filed a response to ThermaPure’s request for additional  
7 time to conduct discovery pursuant to Fed. R. Civ. P. 56(d) (Dkt. 34). On July 26, 2012,  
8 the Court granted ThermaPure’s request and renoted WOO’s motion to October 26, 2012.  
9 Dkt. 38. On October 22, 2012, ThermaPure filed a supplemental response. Dkt. 39. On  
10 October 29, 2012, WOO filed a supplemental reply. Dkt. 49. On November 13, 2012,  
11 the Court granted WOO’s motion. Dkt. 51.

12                  On December 4, 2012, WOO filed a motion for attorneys’ fees. Dkt. 57. On  
13 December 17, 2012, ThermaPure responded. Dkt. 61. On December 21, 2012, WOO  
14 replied. Dkt. 66. On December 24, 2012, ThermaPure filed a surreply and motion to  
15 strike. Dkt. 69.

16                   **II. DISCUSSION**

17                  **A. Motion to Strike**

18                  ThermaPure correctly moves to strike new evidence and argument submitted in  
19 WOO’s reply. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996), cert. denied, 522  
20 U.S. 808 (1997). The Court grants the motion and will not consider (1) argument that the  
21 ‘812 Patent is not directed at mold based on a statement made in the ‘491 patent, and (2)

1 evidence that ThermaPure rejected an early, reasonable, and generous settlement offer  
2 which caused Water Out to incur substantial attorneys' fees.

3 **B. Motion for Fees**

4 Section 285 of the Patent Act provides that “[t]he court in exceptional cases may  
5 award reasonable attorney fees to the prevailing party.” 35 U.S.C. § 285.

6 When deciding whether to award attorneys' fees under § 285, a  
7 district court engages in a two-step inquiry. First, the court must determine  
8 whether the prevailing party has proved by clear and convincing evidence  
9 that the case is exceptional . . . . If the district court finds that the case is  
10 exceptional, it must then determine whether an award of attorney fees is  
11 justified.

12 *Marctec, LLC v. Johnson & Johnson*, 664 F.3d 907, 915–16 (Fed.Cir.2012). The moving  
13 party must demonstrate that the claims filed were “objectively baseless” and “brought in  
14 subjective bad faith.” *Id.* at 916.

15 In this case, WOO has failed to provide clear and convincing evidence that this  
16 case is exceptional. It's undisputed that ThermaPure received a verdict of infringement  
17 against Water Out Corp, a company that controls Water Out contractors and distributes  
18 machines that allegedly can be used to infringe ThermaPure's patent. Moreover,  
19 Thermapure has submitted evidence that a pre-filing investigation was conducted. In  
20 light of this evidence, WOO has failed to show that the complaint was objectively  
21 baseless. Therefore, the Court denies WOO's motion for attorneys' fees.  
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### III. ORDER

Therefore, it is hereby **ORDERED** that ThermaPure's motion to strike (Dkt. 61) is **GRANTED** and WOO's motion for attorneys' fees (Dkt. 57) is **DENIED**.

Dated this 16th day of January, 2013.

  
BENJAMIN H. SETTLE  
United States District Judge